IN THE SUPREME COURT OF MISSOURI

No. SC93120

CLAYTON DEAN PRICE,

Respondent

v.

STATE OF MISSOURI,

Appellant.

SUBSTITUTE BRIEF OF RESPONDENT

CLAYTON PRICE

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

ORAL ARGUMENT REQUESTED

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STATEMENT OF FACTS

1. Price's Conviction, Sentence, and Direct Appeal

Respondent Clayton Price was convicted of statutory sodomy in the first degree on March 9, 2004, after a jury trial in Taney County, Missouri. LF 80. On June 4, 2004, he was sentenced to 12 years imprisonment in the Missouri Department of Corrections. LF 80. Price's trial counsel filed a motion for new trial and then withdrew. LF 80. Price retained new counsel to handle his direct appeal; Price's conviction was affirmed in *State v. Price*, 165 S.W.3d 568 (Mo.App. 2005). LF 80. The issuance of the court's mandate started the running of the 90-day period within which Price could file his Rule 29.15 motion. Because the mandate was issued on July 15, 2005, Price's 29.15 motion was due on October 13, 2005. *Price v. State*, No. SD31725, slip op. at 4, 2012 WL 6725611, at *2 (Mo.App. 2012). No 29.15 motion was filed prior to the expiration of the deadline. *Id.* When Price's counsel realized he had missed the deadline, Price's counsel filed a motion to recall the mandate on January 17, 2006, to restart the 90-day 29.15 filing window. *Id.* The Missouri Court of Appeals for Southern District denied the motion on January 26, 2006. *See* Record on Appeal in Record transferred from SD26318.

2. Price's Counsel Fails to Timely File a Rule 29.15 Motion

Price's counsel missed the deadline for filing a 29.15 motion for post-conviction relief. LF 80. The motion court found, and the State does not dispute, that "Carver [Price's post-conviction counsel] told Price he would timely file the 29.15." LF 75. The court further found, and the State does not challenge:

Carver, under the press of other business, missed the deadline, failing to

pay attention to the correct deadline he had received at the sentencing hearing. Carver has candidly admitted that the missed deadline was completely and entirely his fault. He attributes no fault or blame to Price, and there is no evidence of any such fault or blame on Price, who reasonably relied upon the otherwise capable attorney he had hired to file the 29.15 motion on his behalf.

LF 75-76. The court also found that "Carver overtly acted to prevent Price from taking other steps to make a 29.15 filing, by misleading Price into thinking Carver would file for him." LF 76.

Carver filed an affidavit with the motion court stating that he was retained by Price to file the 29.15 motion, that he assumed responsibility for filing the motion, and that he repeatedly represented to Price and Price's family that he would "get the motion filed within the prescribed deadline." A8-A10; Resp's Ex. 43 (Tab 14). Carver failed to take any action to file the motion within the 90-day deadline. A8-A10; Resp's Ex. 43 (Tab 14).

3. Price's Counsel Files Petition for Writ of Habeas Corpus

On December 29, 2006, other counsel for Price filed a petition for writ of habeas corpus on his behalf in the Circuit Court of Texas County, Missouri. LF 60, 80. On January 18, 2008, the court, Judge Mary Sheffield acting, granted the writ, vacated Price's conviction, and remanded the case for a new trial. LF 60, 80. On Sept. 30, 2008, the Southern District entered its order quashing the writ on procedural grounds and vacating the order, *State ex rel. Nixon v. Sheffield*, 272 S.W.3d 277 (Mo.App. 2008). LF

60, 80. Price sought transfer to this Court, which was denied on January 27, 2009 "without prejudice to seeking relief, if any, pursuant to *McFadden v. State*, 256 S.W.3d 103 (Mo.banc 2008)." LF 62, 73-74, 81. (emphasis added).

4. Price Seeks Leave to File Rule 29.15 Motion Out of Time Due to Abandonment and Court Grants Motion

On December 31, 2009, Price, through his present counsel, requested leave to file his 29.15 motion out of time due to abandonment by post-conviction relief counsel in failing to timely file the initial 29.15 motion. LF 6-59. On February 25, 2010, the State responded, asserting only that: 1) Price failed to file his 29.15 motion within the 90-day deadline; and 2) that Price had not been abandoned by his post-conviction relief counsel. LF 60-63. On July 16, 2010, the motion court conducted an evidentiary hearing on Price's motion and entered its order, including its findings of fact and conclusions of law, on September 3, 2010. The court sustained Price's motion for leave to file out of time and ordered the 29.15 motion filed the same day. LF 75-79; A11-A15. The court ruled that it has authority to reopen 29.15 proceedings when a movant establishes abandonment by counsel. LF 76; A12. The court also observed that any discussion of abandonment in Price's habeas proceeding was dicta since an abandonment claim is not cognizable in a state habeas proceeding. LF 78; A14. The court granted Price's motion for leave to file out of time due to abandonment because "Price is without fault, and his attorney is solely to blame, for Price's failure to timely file an original 29.15 motion." LF 78; A14. The court found that Price's counsel had "overtly acted to prevent Price from taking other steps to make a 29.15 filing by misleading Price into thinking Carver would file for him."

LF 76; A12. There was no appeal from the motion court's order, and the State did not seek relief by writ.

5. Court Grants Rule 29.15 Relief on the Merits and Vacates Conviction After Finding Trial Errors Violating Price's Constitutional Rights

After a three-day evidentiary hearing in March, 2011, the motion court entered its judgment granting Price's 29.15 motion, vacating his conviction, establishing bail conditions and ordering the State to notify Price of its intent to retry him within 45 days of the date of its October 26, 2011 judgment. LF 80-130. The motion court found more than ten violations of Price's constitutional rights, primarily involving ineffective assistance of counsel. LF 80-130. The State has challenged none of the court's findings on the merits concerning ineffective assistance of trial counsel and other constitutional-level errors (App's Br), and those issues are not in front of this Court.

In its Statement of Facts, the State mentions none of the factual findings of the 29.15 motion court but instead spends four pages restating the factual findings from Price's direct appeal. App's Br 6. The direct appeal facts are included by the State in a shameful and blatant attempt to inflame this Court and prejudice it against Price. The State's reference to the direct appeal facts is inappropriate, highly prejudicial, and should be ordered stricken given that (1) the State has not challenged any finding on the merits, and (2) the State's recitation of the direct appeal facts is based on a record from a trial two separate courts (J. Sheffield and J. Sweeney) with over 50 years combined experience on the bench have concluded resulted in deprivation of Price's constitutional right to effective assistance of counsel. In fact, Judge Sweeney expressed three times that

he had no confidence in the outcome of the trial due to the failings of Price's trial counsel. LF 116, 128, 129. Should this Court desire to review any discussions of the merits, it should review the motion court's findings as to the merits at Legal File 80-130 or Judge Sheffield's findings in the Record at *State ex rel. Nixon v. Sheffield*, 272 S.W.3d 277 (Mo.App. 2008). Resp. Ex. 43 (Tab 18).

6. The State Appeals, Challenging Only Finding of Abandonment, Raising the Issue of Unreasonable Delay for the First Time

On November 23, 2011, the State filed its Notice of Appeal from the motion court's October 25, 2011 judgment vacating Price's conviction. LF 131-135. Price cross-appealed, but voluntarily dismissed his cross-appeal. SD31735. The State's appeal challenged none of the motion court's findings on the merits and asserted that Price's 29.15 motion was filed out of time because he was not abandoned by his post-conviction relief counsel when counsel failed to timely file the initial 29.15 motion. App's SD Br. 18-28; *Price v. State*, No. SD31725, slip op. at 1, 2012 WL 6725611, at *1 (Mo.App. 2012). For the first time on appeal, the State also asserted that Price failed to file his 29.15 motion within a "reasonable amount of time" after learning of abandonment by his post-conviction relief counsel. App's SD Br. 29-33; *Price*, slip op. at 10, 2012 WL 6725611, at *5. The State did not raise this argument in the motion court. LF 60-63; *Price*, slip op. at 10-11, 2012 WL 6725611, at *5. Because the State did not raise the issue, no evidence pertinent to a "reasonable amount of time" was presented and no findings or conclusions were made.

7. The Court of Appeals Affirms; This Court Grants Transfer

On December 28, 2012, the court of appeals affirmed the motion court's vacation of Price's conviction. *Price v. State*, No. SD31725, slip op. at 1-2, 2012 WL 6725611, at *1 (Mo.App. 2012).

On April 30, 2013, this Court granted the State's application for transfer.

POINTS RELIED ON

I. The motion court correctly permitted Price to file his Rule 29.15 motion out of time, because Price was abandoned by his retained post-conviction counsel, in that Price's counsel overtly acted by promising to timely prepare and file Price's Rule 29.15 motion and counsel failed to timely file through no fault of Price, who reasonably relied upon the attorney he had hired to file the Rule 29.15 motion on his behalf.

(responds to Point I)

McFadden v. State, 256 S.W.3d 103 (Mo.banc 2008)

Moore v. State, 328 S.W.3d 700 (Mo.banc 2010)

Sanders v. State, 807 S.W. 2d 493 (Mo.banc 1991)

Gehrke v. State, 280 S.W.3d 54 (Mo.banc 2009)

II. The motion court's finding that Price was abandoned by his retained post-conviction counsel for failure to timely file Price's Rule 29.15 motion should be upheld, because the State has waived any argument concerning whether Price's motion was filed in a "reasonable amount of time," in that the State failed to raise this issue before the motion court.

(responds to Point II)

Amrine v. State, 785 S.W.2d 531 (Mo.banc 1990)

Johnson v. State, 333 S.W.3d 459 (Mo.banc 2011)

Hutton v. State, 345 S.W.3d 373 (Mo.App. 2011)

Day v. State, 208 S.W.3d 294 (Mo.App. 2006)

III. The motion court correctly permitted Price to file his Rule 29.15 motion out of time, because Price was abandoned by his retained post-conviction counsel and Price properly and reasonably pursued his claim of abandonment, in that Price pursued all relief available to him and raised his claim of abandonment following this Court's suggestion that he was free to do so.

(responds to Point II)

Daugherty v. State, 116 S.W.3d 616 (Mo.App. 2003)

Dudley v. State, 254 S.W.3d 109 (Mo.App. 2008)

Gehrke v. State, 280 S.W.3d 54 (Mo.banc 2009)

Moore v. State, 328 S.W.3d 700 (Mo.banc 2010)

IV. The motion court's finding that Price was abandoned by his retained post-conviction counsel for failure to timely file Price's Rule 29.15 motion should be upheld and the State's appeal dismissed, because this Court lacks jurisdiction to entertain the State's appeal of the motion court's abandonment finding, in that the State did not timely appeal from the motion court's order finding abandonment before proceeding with a hearing on the merits.

(responds to Point I)

Rule 29.15(k)

Sec. 547.360, RSMo.

Goldberg v. Mos, 631 S.W.2d 342 (Mo. 1982)

State v. Gullett, 411 S.W.2d 227 (Mo. 1967)

Hershewe v. Alexander, 264 S.W.3d 717 (Mo.App. 2008)

ARGUMENT

I. The motion court correctly permitted Price to file his Rule 29.15 motion out of time, because Price was abandoned by his retained post-conviction counsel, in that Price's counsel overtly acted by promising to timely prepare and file Price's Rule 29.15 motion and counsel failed to timely file through no fault of Price, who reasonably relied upon the attorney he had hired to file the Rule 29.15 motion on his behalf.

(responds to Point I)

Standard of Review

A motion court's judgment on a motion for post-conviction relief "will be overturned only when either its findings of facts or its conclusions of law are clearly erroneous." *Baumruk v. State*, 364 S.W.3d 518, 525 (Mo.banc 2012); Rule 29.15(k). *See also Eastburn v. State*, No. SC92927, slip op. at 3 (Mo.banc 2013). "[T]o overturn the ruling of the motion court on a Rule 29.15 motion, this Court must be left 'with a definite and firm impression' that the motion court made a mistake." *Baumruk*, 364 S.W.3d at 525 (quoting *Zink v. State*, 278 S.W.3d 170, 175 (Mo.banc 2009)). "In addressing post-conviction motions, this Court should presume that a motion court acted according to the law." *Baumruk*, 364 S.W.3d at 526.

The motion court has considerable discretion in determining whether post-conviction counsel has abandoned a movant. *See Riley v. State*, 364 S.W.3d 631, 636 (Mo.App. 2012) ("The precise circumstances, in which a motion court may find

abandonment, are not fixed. . . .") (quoting *Crenshaw v. State*, 266 S.W.3d 257, 259 (Mo.banc 2008)).

Rule 29.15 Deadlines and the "Overt Act" Abandonment Exception

Missouri permits post-conviction relief by court rule, now Rule 29.15. *See* Rule 29.15. Where the movant has unsuccessfully challenged the underlying conviction by direct appeal, a 29.15 motion for post-conviction relief "shall be filed within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence." Rule 29.15(b). "Failure to file a motion within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed under this Rule 29.15 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 29.15." Rule 29.15(b). "Under normal circumstances, if a movant fails to file a Rule 29.15 motion within the 90-day time limit set by Rule 29.15(b), the motion is untimely and the motion court is compelled to dismiss it." *McFadden v. State*, 256 S.W.3d 103, 106 (Mo.banc 2008) (citation omitted). "The State cannot waive movant's noncompliance with the time limits in Rules 29.15 and 24.035." *Dorris v. State*, 360 S.W.3d 260, 268 (Mo.banc 2012).[1]

"While there is no provision in Rule 75.01 to allow late filings, this Court has recognized a late filing may be accepted when a movant has been abandoned by post-

[1] As discussed *infra*, many states and the Federal system recognize that abandonment by post-conviction counsel does not fit within the "normal circumstances" that warrant strict application of filing deadlines and permit movants to file out of time in such situations.

conviction counsel." *Eastburn*, No. SC92927, slip op. at 4 (Mo.banc 2013). Over two decades ago, this Court recognized that the abandonment exception applies to 29.15 proceedings in *Luleff v. State*, 807 S.W.2d 495 (Mo.banc 1991), and *Sanders v. State*, 807 S.W.2d 493 (Mo.banc 1991), establishing the cornerstone principles of abandonment – all fault to counsel and no fault to movant. In *Gehrke v. State*, 280 S.W.3d 54 (Mo.banc 2009), this Court described the abandonment exceptions, first articulated in *Luleff*, 807 S.W.2d 495 (Mo.banc 1991) and *Sanders*, 807 S.W.2d 493 (Mo.banc 1991), as follows:

> This Court initially found abandonment in two scenarios: when (1) post-conviction counsel takes no action with respect to filing an amended motion and as such the record shows that the movant is deprived of a meaningful review of his claims; or (2) when post-conviction counsel is aware of the need to file an amended post-conviction relief motion and fails to do so in a timely manner. . . .

Gehrke, 280 S.W.3d at 57 (internal citations and quotations omitted).

More recently in *McFadden v. State*, 256 S.W.3d 103 (Mo.banc 2008), this Court recognized the "overt act" abandonment exception. In *McFadden*, this Court permitted late filing of an initial 29.15 motion where the record established that a public defender promised McFadden that she would timely file his *pro se* 29.15 motion but failed to file the motion until the day after it was due. *Id.* at 105. The court observed: "The public defender undertook to represent Mr. McFadden when she provided legal advice and directed him to provide the motion directly to her for filing. Mr. McFadden reasonably relied upon these instructions." *Id.* at 107. "[T]he public defender undertook to represent

Mr. McFadden and then simply abandoned that representation. Mr. McFadden, on the other hand, did all he could to express an intent to seek relief under Rule 29.15, took all steps to secure this review, and was free of responsibility for the failure to comply with the requirements of the rule." *Id.* at 109 (internal quotation omitted). The court concluded that "Mr. McFadden, having been abandoned by counsel who undertook to perform a necessary filing and then simply failed to do so . . . is entitled to relief. . . . Such active interference, as demonstrated here, constitutes abandonment. In these unique circumstances, the motion court is authorized to reopen the otherwise final post-conviction proceeding." *Id.* at 109.[2]

Although *McFadden* involved a public defender, and Price privately retained his post-conviction counsel, Missouri courts draw no distinction between appointed and retained counsel for purposes of abandonment. The State does not argue otherwise on appeal. *See Castor v. State*, 245 S.W.3d 909, 912 (Mo.App. 2008) ("[T]here are cases that have applied the concept of abandonment where post-conviction counsel was privately retained. Thus, the concept of abandonment for the failure to file a timely

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[2] In *McFadden*, the Court noted that late filings had been permitted in other post-conviction cases involving circumstances beyond the movant's control, citing *Nicholson v. State,* 151 S.W.3d 369 (Mo.banc 2004) (motion sent to wrong court), and *Spells v. State,* 213 S.W.3d 700 (Mo.App. 2007) (court's post office box change resulted in untimely filing).

amended motion is equally applicable to both appointed and retained counsel and the State's argument fails.") (citations omitted).

This Court has discussed and applied *McFadden*. In *Gehrke*, this Court noted: "Recently, this Court recognized an additional circumstance in which a movant may be abandoned. In *McFadden v. State*, this Court held that where post-conviction counsel overtly acts in a way that prevents the movant's timely filing of a post-conviction motion, a movant is entitled to relief." *Id.* at 57 (declining to extend abandonment to include counsel's conduct in failing to file properly a notice of appeal of a judgment overruling a post-conviction motion). In *Moore v. State*, 328 S.W.3d 700 (Mo.banc 2010), this Court cited *McFadden* and noted that "[a] third type of abandonment occurs when post-conviction counsel's overt actions prevent the movant from filing the original motion timely." *Id.* at 702 (finding appellate counsel's failure to inform defendant the mandate had issued did not constitute abandonment). In *Moore*, Judge Stith filed a concurring opinion, joined by Judge Teitelman, discussing *McFadden* in even greater detail:

> [W]here counsel affirmatively has told the client that counsel will take responsibility for a matter, then the client has the right to rely on the statement, as this Court recognized in *McFadden v. State*, 256 S.W.3d 103, 109 (Mo.banc 2008). As the principal opinion notes, *McFadden* found ineffective assistance where post-conviction counsel did not timely file movant's *pro se* motion despite promising to do so. This was so even though, absent counsel's voluntary undertaking to do so, movant would have been obligated to file his post-conviction motion himself. Having

undertaken to file the motion for movant, counsel was obligated to complete that task.

Here, Mr. Moore similarly argues that counsel undertook to inform him when the mandate was issued by the appellate court but failed to do so. If the record supported this argument, then he would be entitled to relief. This is so even though, as the principal opinion notes, Missouri's rules do not impose a requirement on counsel to inform a client about the issuance of the mandate in the usual case. That is because, once counsel undertakes such an obligation, then a defendant had a right to rely on counsel to complete the undertaking. The failure to do so violates Missouri's ethical rules.

Id. at 703-04 (citing Rule 4-1.3, "Diligence"; Rule 4-1.3, Cmt 4; Rule 4-1.4; Rule 4-1.4, Cmt 1). *See also Riley v. State*, 364 S.W.3d 631, 637 (Mo.App. 2012) ("A third type of abandonment occurs when post-conviction counsel's overt actions prevent the movant from filing the original motion timely.") (quoting *Moore v. State,* 328 S.W.3d 700, 702 (Mo. banc 2010) (citing *McFadden v. State,* 256 S.W.3d 103, 109 (Mo. banc 2008)). *See also Ewing v. Denney*, 360 S.W.3d 325, 331 n.12 (Mo.App. 2012) (if "trial or appellate counsel agree to assume the mantle of post-conviction counsel for a client," and then fail to do so, a claim for abandonment under *McFadden* should be brought).

Recently, in *Eastburn v. State*, No. SC92927, slip op. (Mo.banc 2013), this Court affirmed the motion court's finding of no abandonment where the movant's post-conviction counsel timely filed a 29.15 motion. This Court explained the abandonment

exceptions applicable to 29.15 motions and again affirmed that *McFadden* remains good law. Importantly, the Court observed that, because the initial 29.15 motion was timely filed but movant wished counsel would have raised other arguments in the motion, "[m]ovant's claim would be more appropriately characterized as a claim of ineffective assistance of post-conviction counsel . . . ." *Eastburn*, slip op. at 5. Price's case stands in sharp contrast to *Eastburn* since Price's counsel failed to timely file the initial 29.15 motion, despite having been retained to do so. Mr. Carver provided no counsel at all, not simply ineffective assistance of counsel or "deficient" counsel, as the State asserts. App's Br 32.

Here, the motion court expressly found that Price's counsel "overtly acted" to prevent Price from filing the motion himself or through other counsel. LF 76; A12. This finding is not just presumed correct – it is fully supported by the record.

Price's Post-Conviction Counsel Abandoned Price When He Failed to Timely File the Rule 29.15 Motion

This case fits squarely within the abandonment exception for a late 29.15 motion outlined in *McFadden*. Contrary to the State's argument, application of *McFadden* to Price does not involve an expansion of *McFadden*. The only difference between Price and McFadden is that Price retained counsel and McFadden utilized a public defender, ultimately appointed to represent him. This is a distinction without a difference. *See Castor v. State*, 245 S.W.3d 909, 912 (Mo.App. 2008) ("Thus, the concept of abandonment for the failure to file a timely amended motion is equally applicable to both appointed and retained counsel and the State's argument fails."). Indeed, to rule

otherwise would improperly penalize those who hire counsel and could ultimately encourage further overburdening of the public defender system by limiting a narrow "overt act" abandonment exception to only those who utilize appointed counsel. Counsel who fail to timely meet their filing obligations, whether retained or appointed, are not acting as their client's agent "in any meaningful sense of the word," as Justice Alito stated in *Holland v. Florida*, 560 U.S. ___, 130 S. Ct. 2549, 2568 (2010), and the failure to act promptly is not and should not be imputed to the client.

Price relied on Attorney Carver to file his 29.15 motion. Attorney Carver has testified that he was retained by Price to timely file the 29.15 motion and that he failed to do so. Carver actively interfered with Price's right to post-conviction relief by abandoning Price in the same way the public defender abandoned McFadden—by promising to file a pleading within the 90-day deadline set out in 29.15 and failing to do so. Price, like McFadden, is blameless for his attorney's abandonment and the State does not suggest otherwise.

Although it does not dispute the record evidence that Price bore no blame for counsel's failure to timely file the 29.15 motion, the State does assert that Price was not *prevented* from filing his own motion. App's Br 25-26. There is no record evidence to support the State's plucked from thin air assertion that Price "apparently" was not instructed by counsel not to file his own *pro se* motion. The court should reject the State's speculation as unsupported by the record.

Taking the State's argument to its logical conclusion, McFadden was not prevented from filing his motion either; he could have filed it on his own to ensure a

timely filing, despite the public defender's assurances that she would timely file the motion. As in *McFadden*, Price reasonably relied on the assurances of a licensed attorney in good standing that the motion would be timely filed. The *McFadden* court made clear that a party seeking relief under Rule 29.15 has no duty to second-guess legal counsel and make a *pro se* filing under Rule 29.15 to ensure the right to relief is not waived. The United States Supreme Court recently affirmed that a movant has no duty to second-guess his retained counsel in the context of abandonment for purposes of a federal habeas claim. "[A] client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him." *Maples v. Thomas*, 132 S. Ct. 912, 924 (2012).

Bullard Does Not Dictate a Different Result

The State asserts this case is analogous to *Bullard v. State*, 853 S.W.2d 921 (Mo.banc 1993), and requests a ruling on whether *McFadden* effectively overruled *Bullard*. In his dissenting opinion below, Judge Scott expressed "no personal quarrel with the result reached by the majority . . . [in its] thoughtfully-reasoned opinion," but was uncertain about the application of *Bullard* in light of *McFadden*. *Price v. State*, No. SD31725, slip op. at 4-5, 2012 WL 6725611, at *7 (Scott, P.J., dissenting). He asserted that "*McFadden* seemingly should have overruled *Bullard*" if the active interference in *McFadden* involved telling the client she would do something and failing to do it. *Id.*

In *McFadden*, this Court rejected the State's argument that *Bullard* required a finding of no abandonment: "Certainly, the state is correct that *Bullard* held that

ineffective assistance of counsel in informing his client when a post-conviction motion is due does not constitute abandonment. That is not what occurred here, however: the public defender accurately told Mr. McFadden when his motion had to be filed, but she then told him to give it to her for filing, and then simply abandoned that undertaking. *Bullard*, thus, is not dispositive." *McFadden*, 256 S.W.3d at 108.

Because *McFadden* was distinguishable from *Bullard*, there was no need for this Court to overrule *Bullard*. Likewise, because this case is consistent with *McFadden*, and equally distinguishable from *Bullard*, there is no need for this Court to overrule *Bullard* to affirm the Southern District's decision. Bullard was convicted, sentenced, and timely filed his notice of appeal. 853 S.W.2d at 922. On appeal, Bullard hired a new attorney who also agreed to represent him in the 29.15 proceedings. *Id.* "Allegedly, this new attorney told Bullard that a 29.15 motion could be timely filed *after* the appellate court ruled on the direct appeal." *Id.* (emphasis in original). The 29.15 motion was actually due April 29, 1991, not after the appellate court had ruled on the direct appeal, as appellate counsel had advised. *Id.* No 29.15 motion was filed by April 29, 1991. *Id.* After the Western District Court of Appeals affirmed Bullard's conviction, *State v. Bullard,* 847 S.W.2d 68 (Mo.App. 1991), Bullard fired appellate counsel and hired a third attorney to pursue his post-conviction action, filing a 29.15 motion in December 1991 and thereafter filing an amended motion in January 1992. *Bullard,* 853 S.W.2d at 922. This Court took transfer of the case post-opinion and affirmed the motion court's order dismissing the 29.15 motion for failure to comply with the Rule's time limits. *Id.*

This Court first noted that it had previously recognized that abandonment by counsel excuses the untimely filing of an amended motion if the movant is without fault. *Id.* (citing *Sanders,* 807 S.W.2d at 495, and *Luleff,* 807 S.W.2d at 497-98). It went on to distinguish between amended and *pro se* motions and the applicability of the abandonment doctrine. The Court noted that amended motions differ significantly from *pro se* motions, since they require legal expertise by counsel to ensure their proper drafting. *Bullard,* 853 S.W.2d at 922-23. In contrast, *a pro se* motion is "relatively informal, and need only give notice to the trial court, the appellate court, and the State that movant intends to pursue relief under Rule 29.15. . . As legal assistance is not required in order to file the original motion, the absence of proper legal assistance does not justify an untimely filing." *Id.* The Court thus rejected the applicability of the doctrine of abandonment to the filing of a *pro se* motion.

There is no need to overrule *Bullard* because Price, unlike Bullard, was not acting *pro se* and simply relying on the incorrect advice of counsel regarding the filing deadline. In such circumstance, the correct analysis as set forth in *Bullard* and *McFadden* is that mere ineffective assistance of counsel in the form of the giving of an incorrect deadline may not constitute abandonment.[3] However, where, as here, counsel agrees to file the 29.15 motion and fails to do so, counsel has abandoned the client, and late filing should

[3] Judges Stith and Teitelman indicated in the concurring opinion in *Moore* that they would also find abandonment in this circumstance on the basis of violation of the Missouri ethical rules. *Moore*, 328 S.W.3d at 704-05 (Stith, J., concurring).

be permitted. The same is true whether retained counsel agrees to prepare and file the motion and fails to do so (here) or whether a public defender agrees to file a motion prepared by the movant and fails to do so (*McFadden*). The "overt act" is undertaking representation of the client and failing to perform. The State relies on the language in *McFadden* that "[c]ounsel's failure did not occur due to a lack of understanding of the rule, out of an ineffective attempt at filing, or as a result of 'an honest mistake,' none of which will justify failure to meet the time requirements. Rather, the public defender undertook to represent Mr. McFadden and then simply abandoned the representation." *McFadden*, 256 S.W.3d at 109. *McFadden* provides no insight as to why the public defender missed the filing deadline by one day. *Id.* at 105. Frankly, the public defender's mental state and/or reasoning for missing the deadline make no difference. The key analysis is that neither McFadden's public defender nor Price's attorney provided incorrect advice about the Rule 29.15 filing deadline; instead, both undertook to represent a client and file a motion by the correct deadline and failed to do so, through no fault of the client, justifying a finding that the narrow "overt act" abandonment exception applies. The same analysis should apply regardless of whether counsel was negligent, grossly negligent, or even engaged in some sort of willful misconduct in missing the deadline.

In *Bullard,* while appellate counsel apparently misstated the applicable time limits, there is no indication that appellate counsel took from Bullard the ability to file the motion himself. Indeed, the Court's opinion summarizes the 29.15 motion, which alleged that counsel told Bullard the motion "could be timely filed," suggesting, by its use of the

passive voice, that no actor for that event was designated. *Bullard*, 853 S.W.2d at 922. The only thing clear in *Bullard* is that counsel gave inaccurate advice concerning the filing deadline; it is not clear that counsel agreed to file the motion and failed to do so. It is not clear that Bullard had any reason to believe that he could not or should not file the initial 29.15 motion on his own. *Bullard* certainly did not address the Price scenario, where counsel unquestionably agreed to file the original 29.15 motion.

The State also cites *Barnett v. State*, 103 S.W.3d 765, 774 (Mo.banc 2003), for the proposition that the scope of abandonment will not be expanded to encompass perceived claims of ineffective assistance of counsel. *Id.* (declining to find abandonment due to post-conviction counsel's alleged ineffective assistance in failing to raise certain arguments in a timely filed post-conviction relief motion). Obviously, Price's situation involves post-conviction counsel's complete failure to file his 29.15 motion and does not involve post-conviction counsel's failure to raise certain arguments in a timely filed 29.15 motion. Accordingly, *Barnett* has no application to Price's claim of abandonment.

Here, the motion court found that Price was not negligent and did not intentionally fail to file his 29.15 motion. LF 76; A12. The motion court further found that Price's post-conviction counsel was "solely to blame" for Price's failure to timely file his 29.15 motion for post-conviction relief and that counsel "overtly acted" and prevented Price from filing his own 29.15 motion by misleading Price into thinking counsel would file the 29.15 motion for him. LF 76, 78; A12, A14.

It is undisputed that Price's retained post-conviction counsel failed to take any action on Price's behalf and Price was deprived of a meaningful review of his claims as a

result. If the abandonment exception does not apply to Price, then he will have been deprived of judicial review of his constitutional claims, which have now been validated by two different trial judges, simply because he did not second-guess his retained post-conviction counsel and file his own *pro se* motion. The Supreme Court of Missouri created the abandonment doctrine decades ago for just such a situation.

A Finding of Abandonment is Consistent with the Missouri Rules of Professional Conduct

In her concurring opinion in *Moore*, Judge Stith, joined by Judge Teitelman, observed that "where counsel affirmatively has told the client that counsel will take responsibility for a matter, then the client has the right to rely on that statement, as this Court recognized in *McFadden v. State*, 256 S.W.3d 103, 109 (Mo.banc 2008)." *Moore*, 328 S.W.3d at 703 (Stith, J., concurring). Although the State wishes to distinguish *McFadden* on the basis that counsel affirmatively took possession of *McFadden*'s self-drafted motion instead of both failing to draft and then timely file the motion, as in this case, the critical fact in both cases is that counsel agreed to file timely a motion and failed to do so, and no extenuating circumstances make the client's reliance on counsel's promise unreasonable.

In *Moore*, Judge Stith cited two ethical rules violated when counsel undertakes an obligation to the client and fails to perform: Rule 4-1.3, "Diligence;" and Rule 4-1.4, "Communication." *Id.* at 704. Rule 4-1.3 provides: "A lawyer shall act with reasonable diligence and promptness in representing a client." *Moore*, 328 S.W.3d at 704 (Stith, J., concurring). Comment 4 to Rule 4-1.3 provides: "Unless the relationship is terminated

as provided in Rule 4-1.16, a lawyer should carry through to conclusion all matters undertaken for a client." *Id.* "Rule 4-1.4 requires a lawyer to keep the client reasonably informed about the status of the matter, promptly comply with reasonable requests for information, and explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.* Comment 1 to Rule 4-1.4 states: "Reasonable communication between the client and the lawyer is necessary for the client effectively to participate in the representation. Rule 4-1.4(a)(1) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation." *Id.*[4]

Judge Stith concurred with the finding of no abandonment on the facts because Moore failed to present evidence that counsel undertook to inform him when the mandate issued. *Id.* at 705. Further, Moore knew of issuance of the mandate from the notice received from the court clerk and through the information provided by the court at the time of sentencing. *Id.*

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[4] *See also* Restatement (Second) of Agency §387 (An agent is subject to a duty of loyalty that requires him to act solely for the benefit of the principal. If the agent commits a serious breach of this duty without knowledge of the principal, the authority of the agent terminates.); and ABA Model Rules of Professional Conduct 1.1 ("A lawyer shall provide competent representation to the client"), 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."), and 1.4 (identical to Missouri rule regarding communication owed to client).

In contrast to the facts in *Moore*, the facts here demonstrate abandonment by counsel and clear violation of the Missouri Rules of Professional Conduct relating to diligence and communication. The undisputed facts are that counsel undertook to file the 29.15 motion on Price's behalf and failed to do so, missing the deadline due to the "press of other business." LF 75. Counsel had the ethical obligation to follow through on this undertaking. It would be inconsistent with the Missouri Rules of Professional Conduct to impute counsel's failure to follow through with his representation to his client, Price. Even if Price knew the correct deadline, Price would have had no reason to file his motion *pro se* after his retention of counsel for the purpose of filing a motion. It is consistent with the Rules of Professional Conduct to attribute the blame in this situation to counsel and find abandonment rather than impute the failure to Price, resulting in the absurd rule that every person should either 1) not retain counsel and hope to rely on abandonment in a *McFadden*-type scenario or 2) retain counsel but file an initial 29.15 motion *pro se* in case retained counsel misses the deadline.

The State argues that nothing prevented Price from filing his own 29.15 motion despite having retained counsel to file the motion. Assuming *arguendo* that Price was free to file his 29.15 motion *pro se* despite having retained counsel who had an entered an appearance in the case, Price's counsel, who was supposed to be filing the motion, presumably still had Price's file from his appellate work. This would have made it difficult if not impossible for Price to file his motion *pro se*. There is no evidence that Price possessed his file. *See Tennesee v. Whitehead*, 2013 WL 1163919, at *16-17 (finding abandonment justifying tolling of the Tennessee one-year statute of limitation

for filing a post-conviction relief motion where "[t]he lawyer's unreasonable delay in sending Mr. Whitehead his files, exacerbated by the lawyer's erroneous deadline and the delay in notifying Mr. Whitehead that his direct appeals were exhausted and that the attorney-client relationship had ended, constitute an 'objective factor,' an impediment that 'cannot be fairly attributed' to Mr. Whitehead.") (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)); *see also Spitsyn v. Moore*, 345 F.3d 796, 801 (9th Cir. 2003) ("It has been argued that Spitsyn could have satisfied the deadline despite [the attorney's] misconduct by filing a petition *pro se*. But without the file, which [the attorney] still possessed, it seems unrealistic to expect Spitsyn to prepare and file a meaningful petition on his own within the limitations period.").

A Finding of Abandonment is Consistent with Federal Jurisprudence and Abandonment Cases in Other States

A finding that Price was abandoned due to his counsel's failure to fulfill counsel's commitment to timely file Price's initial Rule 29.15 motion, through no fault of Price, is consistent with federal case law and cases from other states on the issue of abandonment.

In *Holland v. Florida*, 560 U.S. ___,130 S. Ct. 2549 (2010),[5] the United States Supreme Court solidified the federal courts' doctrine of equitable tolling for filing of a

[5] For a comprehensive discussion of recent state and federal cases on abandonment and equitable tolling, see Wendy Zupac, Note, *Mere Negligence or Abandonment? Evaluating Claims of Attorney Misconduct After* Maples v. Thomas, 122 Yale L.J. 1328 (March 2013).

habeas petition. The Court rejected the Eleventh Circuit's tolling standard that an attorney's negligent behavior can never constitute an "extraordinary circumstance" warranting equitable tolling as "too rigid" and reversed, holding that it had "previously made clear" that a petitioner is entitled to equitable tolling upon a showing " '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland*, 130 S. Ct. at 2562-63 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The Court concluded that "at least sometimes, professional misconduct that fails to meet the Eleventh Circuit's standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling." *Id.* at 2563. The "extraordinary circumstance" present in the case was counsel's "failure to satisfy professional standards of care." *Id.* at 2562. The Court also relied on an amicus brief arguing that counsel had "violated fundamental canons of professional responsibility" found in case law, the Restatements of Agency, and the American Bar Association's Model Rules of Professional Conduct. *Id.* at 2564-65.

The Court recited several lower court examples of attorney misconduct amounting to an "extraordinary circumstance" justifying equitable tolling. One example given was *Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003), a case strikingly similar to Price's case. Mr. Baldayaque's lawyer "violated a basic duty of an attorney to his client," the "duty of loyalty," by failing to file a habeas corpus petition despite having been instructed by the client to do so. *Id.* at 152. "In spite of being specifically directed by his client's representatives to file a '2255,' Weinstein failed to file such a petition at all. By

refusing to do what was requested by his client on such a fundamental matter, Weinstein violated a basic duty of an attorney to his client." *Id.* "[W]hen an agent acts in a manner completely adverse to the principal's interest, the principal is not charged with [the] agent's misdeeds." *Id.* at 154 (Jacobs, J., concurring) (internal quotation omitted).

Justice Alito authored a separate opinion in *Holland v. Florida* to address the types of attorney misconduct that may qualify as "extraordinary circumstances" justifying tolling the statute of limitations for filing a habeas petition. Justice Alito noted that "attorney negligence is not an extraordinary circumstance warranting equitable tolling," but that the statute of limitations for filing a habeas petition may be tolled "if the missed deadline results from attorney misconduct that is not constructively attributable to the petitioner." *Holland*, 130 S. Ct. at 2568 (Alito, J., concurring). "Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Id.*

Another federal case decided after *Holland, Dillon v. Conway*, 642 F.3d 358 (2d Cir. 2011), is closely analogous to this case. In *Dillon*, the Second Circuit held that the district court erred in failing to equitably toll the limitations period for filing a habeas petition for one day where counsel had promised to file the petition before the filing deadline and failed to do so. 642 F.3d at 364. "Dillon relied on his counsel's assurances that the petition would be filed prior to the deadline. Although miscalculating a deadline is the sort of garden variety attorney error that cannot *on its own* rise to the level of extraordinary circumstances, Dillon's case involved more than a simple miscalculation. [Dillon's counsel] in effect admitted affirmatively and knowingly *misleading* Dillon by

promising him that he would file the petition before November 30, 2007. [Dillon's counsel] breached that promise when he failed to follow his client's instruction, with disastrous consequences that Dillon could neither have foreseen nor prevented." *Id.* at 363-64 (internal citations omitted).

In *Maples v. Thomas*, 132 S. Ct. 912 (2012), the Court adopted Justice Alito's reasoning in finding that counsel's "near-total failure to communicate" amounted to abandonment rather than simple attorney error:

> [U]nder agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him. We therefore inquire whether Maples has shown that his attorneys of record abandoned him, thereby supplying the extraordinary circumstances beyond his control necessary to lift the state procedural bar to his federal petition.

Id. at 924 (internal citations omitted).

State court opinions from other states also support Price's argument that his retained counsel's failure to timely file the initial 29.15 motion, despite having promised to do so, amounts to abandonment under *McFadden*.

In *Steele v. Kehoe*, 747 So.2d 931 (Fla. 1999), the court, in considering Steele's argument that his retained counsel had failed to timely file a postconviction relief motion on Steele's behalf, held that "due process entitles a prisoner to a hearing on a claim that he or she missed the deadline to file a [postconviction relief] motion because his or her

attorney had agreed to file the motion but failed to do so in a timely manner." *Id.* at 934. The court amended its rule to allow filing of a postconviction relief motion after the deadlines set out in the rule where "the defendant has retained counsel to timely file a [postconviction relief] motion and counsel, through neglect, failed to file the motion." *Id.* at 934.[6]

In *Whitehead v. Tennessee*, ___ S.W.3d ___, 2013 WL 1163919 (Tenn. March 21, 2013), the court thoroughly discussed federal and state law concerning abandonment, and held that "[r]ather than perpetuate an artificial and unhelpful distinction between attorney negligence and attorney misrepresentation, we conclude that the better course is to adopt the rule of *Holland* and *Maples* for determining when due process necessitates tolling the Post-Conviction Procedure Act's one-year statute of limitations." *Id.* at *13. The court noted that the elements of *Holland* had been present in Tennessee's analysis of due process tolling for some time, but that lower courts had tended to focus on whether cases fit within one of three exceptions previously articulated by the Tennessee Supreme Court. *Id.*

The court held that the two-pronged inquiry of *Holland* and *Maples* should guide all future analysis of whether the postconviction relief deadline in Tennessee should be equitably tolled based on the conduct of counsel, and that tolling should be permitted

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[6] Note that the Florida rule contains no outer limit on when a motion alleging failure to timely file due to counsel neglect must be filed, which is important for purposes of the State's Point II, discussed below.

"upon a showing (1) that he or she has been pursuing his or her rights diligently, and (2) that some extraordinary circumstance stood in his or her way and prevented timely filing." *Id.* The court noted that "the second prong is met when the prisoner's attorney of record abandons the prisoner or acts in a way directly adverse to the prisoner's interests, such as by actively lying or otherwise misleading the prisoner to believe things about his or her case that are not true." *Id.* The court also noted that it did not expect its ruling "to open the floodgates of due process tolling" because "[o]ther jurisdictions have recognized the *Holland* equitable tolling exception for years, yet its invocation remains rare." *Id.* at *14.

Similarly, any argument that a ruling in Price's favor will open the floodgates to an expanded abandonment exception has no merit because *McFadden* was decided in 2008 and has not opened the floodgates to abandonment litigation. The State makes no floodgate claim here. This is because most cases, as in *Eastburn*, No. SC92927, slip op. (Mo.banc 2013), will not fit into any of the narrow abandonment exceptions articulated by this Court. Those exceptions will remain unchanged after this case since Price is consistent with *McFadden* and simply clarifies that the *McFadden* abandonment exception applies in the case of both retained and appointed counsel. Further, in every case, in order to invoke an abandonment exception, a movant will still have to allege abandonment and will still have to prevail at the initial abandonment hearing before the motion court. This procedure imposes sufficient safeguards to ensure the floodgates remain closed to allegations of abandonment. Missouri's trial courts are staffed with

seasoned jurists widely experienced in evaluating credibility, and they can safely be trusted to exercise their discretion in cases of abandonment by post-conviction counsel.

McFadden is consistent with *Holland*, *Maples*, *Baldayaque*, *Dillon*, *Steele*, and *Whitehead* in holding that an attorney is not the agent of the client where the attorney undertakes to fulfill an obligation to the client and fails to do so. Likewise, the motion court's finding of abandonment in this case, affirmed by the Southern District, is consistent with *McFadden* and the cases cited above because Price's counsel agreed to timely file the 29.15 motion and failed to do so. Price's counsel should not be deemed his agent in this situation where, as Justice Alito found, "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Holland*, 130 S. Ct. at 2568 (Alito, J., concurring).

II. The motion court's finding that Price was abandoned by his retained post-conviction counsel for failure to timely file Price's Rule 29.15 motion should be upheld, because the State has waived any argument concerning whether Price's motion was filed in a "reasonable amount of time," in that the State failed to raise this issue before the motion court.

(responds to Point II)

Standard of Review

A motion court's judgment on a motion for post-conviction relief "will be overturned only when either its findings of facts or its conclusions of law are clearly erroneous." *Baumruk v. State*, 364 S.W.3d 518, 525 (Mo.banc 2012); Rule 29.15(k). "[T]o overturn the ruling of the motion court on a Rule 29.15 motion, this Court must be left 'with a definite and firm impression' that the motion court made a mistake." *Baumruk*, 364 S.W.3d at 525 (quoting *Zink v. State*, 278 S.W.3d 170, 175 (Mo.banc 2009)). "In addressing post-conviction motions, this Court should presume that a motion court acted according to the law." *Id.* at 526.

"Claims which were not presented to the motion court cannot be raised for the first time on appeal." *Amrine v. State*, 785 S.W.2d 531, 535 (Mo.banc 1990). "Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal." *Johnson v. State*, 333 S.W.3d 459, 471 (Mo.banc 2011).

The State Failed to Raise The "Reasonable Time" Argument Below

On appeal, the State claimed for the first time that Price's 29.15 motion was not filed within a "reasonable amount of time" after Price was abandoned. *Price v. State*, No.

SD31725, slip op. at 10-11, 2012 WL 6725611, at *5 (Mo.App. 2012); LF 60-63; App's Br 34-42. The State opposed Price's motion for leave to file his 29.15 motion out of time. LF 60-63. The State only argued that Price did not file within the 90-day window and that he had not been abandoned by counsel. The State never raised the argument that Price failed to file his 29.15 motion within a "reasonable amount of time" even if he had been abandoned. LF 60-63. In raising this issue for the first time on appeal, the State seeks to evade the uniform rule that claims not presented to the motion court cannot be considered by the appellate court – the very rule that the State's present counsel recently embraced in *Collins v. State*, No. ED99214, 2013 WL 3242951, at *1 (Mo.App. June 28, 2013) to dismiss the movant's claim of abandonment. Principles of judicial estoppel prevent the State from embracing a rule when it finds it sweet, only to reject it when it seems bitter.

In *Dorris v. State*, 360 S.W.3d 260 (Mo.banc 2012), this Court held that the issue of a defendant's noncompliance with the time limits of Rule 29.15 may never be waived by the State, but the Court did not hold that the State may raise an argument for the first time on appeal regarding whether a defendant's abandonment claim must be brought within a "reasonable amount of time." *Dorris*, 360 S.W.3d at 268. *See Price v. State*, No. SD31725, slip op. at 11 n.9, 2012 WL 6725611, at *5 n.9 (Mo.App. 2012) ("*Dorris* dealt with 'the court's duty to enforce the mandatory time limits[.]' The State does not claim that any such mandatory time limit applies to the late filing of a 29.15 motion after abandonment." (quoting *Dorris*, 360 S.W.3d at 268)).

In this case, there was and is no dispute that Price's counsel failed to file Price's 29.15 motion within the time limits. The only issue is whether the motion court clearly erred in finding the abandonment exception applies. The State's lately minted "reasonable amount of time" argument is an additional argument against abandonment, which may be waived like any other argument not raised below. It is not like the mandatory deadline set out in Rule 29.15, which the Court in *Dorris* found may not be waived. *Dorris*, 360 S.W.3d at 268.

Because the State failed to raise its "reasonable amount of time" argument before the motion court, the Southern District properly found that it lacked authority to consider the argument for the first time on appeal. *Price v. State,* No. SD31725, slip op. at 11, 2012 WL 6725611, at *5 (Mo.App. 2012) ("By not first raising its claim to the motion court, the State has failed to preserve its second allegation of error for our review."). *See also Hutton v. State*, 345 S.W.3d 373, 377 (Mo.App. 2011) (An appellate court "cannot address any question that was not presented to the motion court."); *Day v. State*, 208 S.W.3d 294, 295 (Mo.App. 2006) ("Claims not presented to the motion court cannot be raised for the first time on appeal."). Appellate courts will not "'convict a lower court of error on an issue that was not put before it to decide.'" *McCullough v. Commerce Bank*, 349 S.W.3d 389, 395 (Mo.App. 2011) (quoting *Baker v. Gonzalez*, 315 S.W.3d 427, 435 (Mo.App. 2010)).

Permitting the State to raise its "reasonable amount of time" argument for the first time on appeal would result in extreme prejudice to Price. Because the State never suggested to the motion court or otherwise that it intended to assert that Price should be

barred from relief due to unreasonable delay, Price did not present evidence to the motion court regarding his actions between his conviction and his motion to file his 29.15 motion out of time. *See Johnson v. State*, 369 S.W.3d 87, 91 (Mo.App. 2012) ("A claim first raised on appeal cannot be reviewed . . . as no findings or conclusions have been made by the motion court regarding the claim.").

The State asks the court to condone a rule which would allow the State to remain silent, even if it felt there were an issue of undue delay, until the evidentiary hearing on the motion for leave to file out of time had been held. The movant, not knowing there was such an issue, would not have presented any evidence on how difficult it is to find post-conviction counsel, how few firms are capable of assuming such a pro bono case, how long it takes to find willing and capable counsel, and how long it takes counsel to investigate a cold record and determine there is a meritorious case. Then, without any evidence on these issues, the State would be able to spring a new claim on the movant at the appellate level. Such a rule would place temptation before justice! It would flout long-established rules of appellate procedure. It would encourage the State to avoid seeking a decision on the merits, or on a developed record, and instead to employ "gotcha!" litigation tactics a grade school child could see are unfair.

Because the State was content to challenge only whether Price had been abandoned and did not present its "reasonable amount of time" argument to the court below, the Court should hold that the State has waived any right to raise this argument on appeal.

III. The motion court correctly permitted Price to file his Rule 29.15 motion out of time, because Price was abandoned by his retained post-conviction counsel and Price properly and reasonably pursued his claim of abandonment, in that Price pursued all relief available to him and raised his claim of abandonment following this Court's suggestion that he was free to do so.

(responds to Point II)

Standard of Review

A motion court's judgment on a motion for post-conviction relief "will be overturned only when either its findings of facts or its conclusions of law are clearly erroneous." *Baumruk v. State*, 364 S.W.3d 518, 525 (Mo.banc 2012); Rule 29.15(k). "[T]o overturn the ruling of the motion court on a Rule 29.15 motion, this Court must be left 'with a definite and firm impression' that the motion court made a mistake." *Baumruk*, 364 S.W.3d at 525 (quoting *Zink v. State*, 278 S.W.3d 170, 175 (Mo.banc 2009)). "In addressing post-conviction motions, this Court should presume that a motion court acted according to the law." *Id.* at 526.

"Claims which were not presented to the motion court cannot be raised for the first time on appeal." *Amrine v. State*, 785 S.W.2d 531, 534 (Mo.banc 1990). "Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal." *Johnson v. State*, 333 S.W.3d 459, 471 (Mo.banc 2011).

Price Raised His Claim of Abandonment Following This Court's Suggestion

Although this Court should decline to review Point II since the State failed to raise this issue before the motion court (*See* Respondent's Point II), the State's argument, even considered on the merits, fails.

This Court should presume that the motion court would have made a finding consistent with the motion court's order allowing Price to file his 29.15 motion out of time. *See Hauter v. Hauter*, 351 S.W.3d 228, 233 n.2 (Mo.App. 2011) (noting that when trial court fails to make a specific finding, the Court of Appeals should interpret the judgment in a manner that is "consistent with the trial court's other findings and with the result reached in the judgment."). The Court should interpret the motion court's judgment as including a finding that Price's 29.15 motion was filed within a reasonable amount of time and should hold that this finding is subject to the same "clearly erroneous" standard of review described above.

Furthermore, nothing in Rule 29.15, *McFadden*, *Moore*, *Gehrke*, or *Luleff* requires that a post-conviction motion asserting abandonment by post-conviction counsel be filed by any set deadline or in a "reasonable amount of time," as the State suggests. *See Moore*, 328 S.W.3d at 701 (29.15 motion filed 218 days late); *Gehrke*, 280 S.W.3d at 56 (motion to reopen post-conviction proceedings filed nearly 5 years late); *Dudley v. State*, 254 S.W.3d 109, 111-112 (Mo.App. 2008) (remanding where motion court clearly erred in holding it did not have jurisdiction to reopen 29.15 proceedings fourteen years after the original judgment to consider claim of abandonment by post-conviction counsel where law had changed in the intervening years); *Daugherty v. State*, 116 S.W.3d 616, 617-18

(Mo.App. 2003) (remanding where motion court clearly erred in holding it lacked jurisdiction to reopen 29.15 proceedings twelve years after denial of initial 29.15 motion to consider movant's claim of abandonment by post-conviction counsel). Indeed, the State makes no effort to define what would constitute a "reasonable amount of time" in this case or any other case. The State's attempt to impose a new restriction onto the abandonment doctrine finds no support in the plain language of Rule 29.15 or in any of the cases interpreting and applying the abandonment doctrine.

In *Fenton v. State*, 200 S.W.3d 136, 140 (Mo.App. 2006), the court discussed the "reasonableness" of a movant attempting to assert a subsequent motion for postconviction relief 23 years after his first motion. The court ultimately remanded for hearing on Fenton's claim of abandonment: "precedent exists for reopening such matters after ten or even twelve years of inactivity . . . drawing the proverbial temporal line in the sand on such matters is additionally complicated by constitutional overtones." *Id.* The same analysis should apply here. The motion court concluded Price received ineffective assistance of counsel at his trial so severe that Price's constitutional rights were violated, a finding not challenged by the State. Given existing authority discussed above sanctioning filings 5, 12, 14, and 23 years out of time, it would be improper and nonsensical to find that Price missed some undefined, arbitrary, magical deadline for raising his claim of abandonment.

Even if the Court were to create a new "reasonable time" restriction to apply to the abandonment doctrine, the record establishes that Price took reasonable steps to obtain post-conviction relief. Price was convicted in March 2004 and sentenced in June 2004.

LF 80. Price's conviction was affirmed on direct appeal in June 2005. LF 80. In January 2006, Price's counsel filed a motion to recall the mandate, to reset the 90-day window for filing a 29.15 motion, which was denied. *See* Record on Appeal in Record transferred from SD26318. In December 2006 (two years before *McFadden* was decided), Price's counsel filed a petition for writ of habeas corpus, which was granted by the motion court but quashed by the Southern District in February 2009. LF 60, 80. On January 27, 2009, this Court denied transfer "without prejudice to seeking relief, if any, pursuant to *McFadden v. State*, 256 S.W.3d 103 (Mo.banc 2008)." LF 62, 73-74, 81. In slightly more than nine months from the date the habeas writ was quashed, Price secured *pro bono* counsel – not easy in such a complex case – who investigated the facts, learned the law and then filed for leave to file the 29.15 motion out of time due to abandonment. This filing was accompanied by a detailed 29.15 motion. LF 6-59. This is not a case where Price sat by, neglecting to assert his claims of error. Instead, at all times since his conviction, Price has pursued post-conviction relief and attempted to raise his claim of abandonment by habeas proceeding and now by 29.15 motion, filed by new counsel after this Court suggested *McFadden* as the appropriate vehicle for relief for Price.

The State relies upon *Gehrke*, *Luleff*, and *Dorris* for its argument that Price did not file his 29.15 motion in a "reasonable amount of time." The State acknowledges that *Gehrke* involved Rule 30.03, which provides a one-year time limit on filing a late notice of appeal, while no similar rule exists here. App's Br 35-36. Further, in *Gehrke*, the Court based its decision on the fact that Gehrke failed to show complete failure by his counsel to act and that a movant such as Gehrke may have potential relief in state and

federal habeas proceedings. *Gehrke*, 280 S.W.3d at 59. In contrast, the Court noted that "[i]f a claim could have been raised in a Rule 24.035 or Rule 29.15 motion but was not raised, the movant waives that claim and cannot raise the claim in a subsequent petition for habeas corpus." *Id.* Thus, unlike Gehrke, Price apparently will forfeit all relief absent a finding of abandonment. Further, in *Gehrke*, the court noted Gehrke's five year delay in filing the motion to reopen and explicitly did not consider the delay in making its ruling. *Id.* at 59 n.6.[7] The State cites *Luleff* for the proposition that, upon a finding of abandonment, the motion court should appoint counsel and permit amendment of the *pro se* motion. App's Br 36 (citing *Luleff*, 807 S.W.2d at 495). *Luleff* was decided nearly 20 years before *McFadden*. Nonetheless, the motion court followed the procedure suggested in *Luleff*. The motion court permitted Price's pro bono counsel to file for leave to file the 29.15 motion out of time. It considered the State's opposition, then held a hearing and sustained Price's motions. LF 75-79.

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[7] Judges Stith and Teitelman would have found have abandonment despite the five year delay. *Gehrke*, 280 S.W.3d at 60-62. "I disagree, however, that it is always the case that 12 months 'is sufficient time for a movant to discover that post-conviction counsel has not filed, or not filed properly, a notice of appeal' as stated by the principal opinion. Rather, it is a question of fact as to what the particular movant should or should not have known within the 12-month window provided for in this Court's rules." *Id.* at 61 (Stith, J., dissenting).

The State cites *Dorris* for the proposition that the time limits in Rule 29.15 serve the purpose of preventing litigation of stale claims. App's Br 37 (citing *Dorris*, 360 S.W.3d at 269). While litigation of stale claims is certainly a valid concern, this Court has recognized in *McFadden* and other cases that, where a movant has been abandoned by post-conviction counsel and bears no fault for the procedural default of counsel, a narrow exception to the time limits of Rule 29.15 exists. This case involves the "narrow exception" recognized by the Court in other situations. Further, any interest in avoiding litigation of stale claims is trumped by the overwhelming interest in preserving constitutional rights and avoiding unconstitutional deprivation of liberty. The State has not challenged the motion court's findings of trial court error violating Price's constitutional rights and requiring vacation of his conviction.

Price was abandoned by his post-conviction counsel, resulting in forfeiture of his right to post-conviction relief, absent application of the abandonment exception. The prejudice resulting to Price from failure to apply the exception would be enormous given that the motion court has already conducted a hearing on the merits and found ineffective assistance of counsel in the trial court violating Price's constitutional rights and requiring vacation of his conviction.

IV. The motion court's finding that Price was abandoned by his retained post-conviction counsel for failure to timely file Price's Rule 29.15 motion should be upheld and the State's appeal dismissed, because this Court lacks jurisdiction to entertain the State's appeal of the motion court's abandonment finding, in that the State did not timely appeal from the motion court's order finding abandonment before proceeding with a hearing on the merits.

(responds to Point I)

Standard of Review

A motion court's judgment on a motion for post-conviction relief "will be overturned only when either its findings of facts or its conclusions of law are clearly erroneous." *Baumruk v. State*, 364 S.W.3d 518, 525 (Mo.banc 2012); Rule 29.15(k). "[T]o overturn the ruling of the motion court on a Rule 29.15 motion, this Court must be left 'with a definite and firm impression' that the motion court made a mistake." *Baumruk*, 364 S.W.3d at 525 (quoting *Zink v. State*, 278 S.W.3d 170, 175 (Mo.banc 2009)). "In addressing post-conviction motions, this Court should presume that a motion court acted according to the law." *Id.* at 526.

"The timely filing of a notice of appeal is jurisdictional." *Goldberg v. Mos*, 631 S.W.2d 342, 345 (Mo. 1982) (citations omitted).

This Court Lacks Jurisdiction to Hear the State's Appeal

On September 7, 2010, the motion court granted Price's motion for leave to file his Rule 29.15 motion out of time due to abandonment by post-conviction counsel. LF 75-79; A11-A15. Under Rule 29.15(a), the Rules of Civil Procedure apply to motions

filed under Rule 29.15. *See also* Sec. 547.360, RSMo. (codifying Rule 29.15). Under 29.15(k), "[a]n order sustaining or overruling a motion filed under the provisions of this Rule 29.15 shall be deemed a final judgment for purposes of appeal by the movant or the state." Under Rule 81.04(a), a notice of appeal "shall be filed not later than 10 days after the judgment or order appealed from becomes final." Under Rule 81.05(a), a judgment becomes final thirty days after its entry if no timely authorized after-trial motion is filed.

Price filed his motion for leave to file out of time under Rule 29.15, the motion court conducted an evidentiary hearing, and it entered an order sustaining Price's motion. Accordingly, the motion court's finding of abandonment after an evidentiary hearing was a final judgment under Rule 29.15(k). That judgment should have been appealed by the State no later than 40 days after September 7, 2010. The State did not file its notice of appeal until November 23, 2011, more than a year later and long after the time for filing the notice had expired. LF 131-132.

The State seeks to avoid Rule 29.15(k) by labeling its appeal as one from the motion court's October 25, 2011 order. LF 131. That order deals with the merits of Price's 29.15 motion and does not contain any findings regarding abandonment. LF 80-131. The State has not challenged, because it cannot challenge, these merits findings. How can the State say it is appealing from an order which it does not contest in any manner?

The State did *not* appeal from the court's September 2010 order, the only order with Findings and Conclusions addressing abandonment. This appeal should, therefore, be dismissed. "The timely filing of a notice of appeal is jurisdictional." *Goldberg v. Mos*,

631 S.W.2d 342, 345 (Mo. 1982). *See also State v. Gullett*, 411 S.W.2d 227, 228 (Mo. 1967) (dismissing appeal where notice of appeal untimely when not filed within 40 days under former Rule 27.26 providing that order overruling motion to vacate a sentence and judgment is deemed a final judgment for purposes of appeal); *Hershewe v. Alexander*, 264 S.W.3d 717, 717 (Mo.App. 2008) (case dismissed for lack of jurisdiction where notice of appeal untimely under statute granting right to appeal order denying motion to compel arbitration).

Rule 29.15(k) promotes judicial economy. If the State believed the motion court clearly erred in finding abandonment, it was required to appeal the September 3, 2010 order (LF 75-79; A11-A15) as a final judgment under Rule 29.15(k) to avoid both parties, the motion court and the judicial system incurring the time and expense of a hearing on the merits. An immediate successful appeal would have avoided the situation now presented here, where the State is asking the Court to find Price forfeited any claim to relief due to failure to timely file his 29.15 motion even though two separate, fully informed and very experienced motion courts have found that Price's trial was riddled with errors violating his constitutional rights and requiring vacation of his conviction.

Price recognizes that the Southern District rejected his argument on the timeliness of the State's appeal, finding that Rule 29.15(k) does not apply because a motion alleging abandonment "exists solely by virtue of case law." *Price v. State*, No. SD31725, slip op. at 7, 2012 WL 6725611, at *3 (Mo.App. 2012). Although Rule 29.15 in its current form may not explicitly permit filing of a motion outside of the time limits in Rule 29.15(b), Price submits that the better holding is to find that any motion requesting leave to file

outside of the time limits in Rule 29.15(b) on the basis of abandonment is in fact a motion filed under or pursuant to Rule 29.15 so that the final judgment language in Rule 29.15(k) applies. Such a holding prevents the situation that occurred here, where the State took no action to challenge the motion court's finding of abandonment, causing the parties and the motion court to expend valuable time and resources on a merits hearing, and then appealed the initial finding of abandonment without challenging the motion court's findings on the merits. Such a result is nonsensical and unnecessarily burdens the judicial system.

CONCLUSION

For the reasons stated herein, respondent Clayton D. Price requests that this Court affirm the judgment of the motion court ordering Price's conviction vacated and set aside upon the terms and conditions set forth in the motion court's judgment; and for such other and further relief as the Court deems just.

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IN THE SUPREME COURT OF MISSOURI

CLAYTON PRICE, Respondent,	)	
v.	)	Case No. SD31725
STATE OF MISSOURI, Appellant.	)	

CERTIFICATE OF COMPLIANCE WITH RULE 84.06 AND CERTIFICATE OF SERVICE

STATE OF MISSOURI)
) ss.
COUNTY OF GREENE)

Pursuant to Rule 84.06(c), counsel for Respondent certifies that this brief complies with the limitations contained in Rule 84.06(b). There are 12,577 words in this brief. Counsel for Respondent relied on the word count of her word processing system in making this certification.

Further, counsel for Respondent states that Respondent's Substitute Brief in the within cause was by her caused to be served, by the Court's electronic filing system and/or by first class mail, postage prepaid, the following number of copies, addressed to the following named persons at the addresses shown, all on this 25th day of July, 2013:

1 e-file copy: Mr. Bill Thompson
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Subscribed and sworn to before me this 25th day of July, 2013.

_____
Notary Public

My commission expires:

_____

DIANE LEONARD
Notary Public – Notary Seal
STATE OF MISSOURI
Lawrence County
My Commission Expires Apr. 30, 2017
Commission #13474937